

## **REMARKS**

### **Status of the Claims**

Claims 1-3, 5-22, 24-31, and 33-45 are pending in the above-identified application. Claims 20-22, 24-31, and 33-42 are currently withdrawn from consideration. As such, claims 1-3, 5-19, and 43-45 stand ready for further action on the merits. Support for the amendments to claims 1, 15-16, 29, 36, and 43 can be found in Table 5 on page 9 of the present specification. Thus, no new matter has been added. Based upon the above considerations, entry of the present amendment is respectfully requested.

In view of the following remarks, Applicants respectfully request that the Examiner withdraw all rejections and allow the currently pending claims.

### **Examiner's Interview**

Applicants would like to thank the Examiner for her time during the interview on October 27, 2010. Applicants appreciate the courtesies extended to them in this application. Although an agreement could not be reached, Applicants believe that the claims are now in condition for allowance. Should the Examiner believe that there remains any outstanding issues, Applicants respectfully request that the Examiner contact Applicants' Representative so as to expedite resolution of these outstanding issues, via an Examiner's Amendment or the like.

### **Issues over the Cited References**

1) Claims 1, 5-6, 9-11, and 14 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sessoms et al. '070 (US 3,851,070) in view of Melnick '830 (US 3,216,830) and Rudan et al. '754 (US 5,366,754).

2) Claims 2-3 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sessoms et al. '070, Melnick '830, and Rudan et al. '754 in view of Unnithan '261 (US 5,932,261).

3) Claims 12-13 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sessoms et al. '070, Melnick '830, and Rudan et al. '754 in view of McGee.

4) Claims 7-8 and 17-19 are rejected under 35 U.S.C. § 103(a) as being obvious over Sessoms et al. '070, Melnick '830, and Rudan et al. '754 in view of Ashmead et al. '427 (US 4,725,427).

5) Claims 15-16 and 43-45 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sessoms et al. '070 in view of Melnick '830, Rudan et al. '754, and Unnithan '261 in view of McGee.

Applicants respectfully traverse. Reconsideration and withdrawal of these rejections are respectfully requested based on the following considerations.

Legal Standard for Determining Prima Facie Obviousness

MPEP 2141 sets forth the guidelines in determining obviousness. First, the Examiner has to take into account the factual inquiries set forth in *Graham v. John Deere*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), which has provided the controlling framework for an obviousness analysis. The four *Graham* factors are:

- (a) determining the scope and content of the prior art;
- (b) ascertaining the differences between the prior art and the claims in issue;
- (c) resolving the level of ordinary skill in the pertinent art; and
- (d) evaluating any evidence of secondary considerations.

*Graham v. John Deere*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966).

Second, the Examiner has to provide some rationale for determining obviousness. MPEP 2143 sets forth some rationales that were established in the recent decision of *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385 (U.S. 2007).

As the MPEP directs, all claim limitations must be considered in view of the cited prior art in order to establish a *prima facie* case of obviousness. See MPEP 2143.03.

Distinctions over the Cited References

As amended, all independent claims recite a fat and/or oil content of 64.50-99.50 wt % and a soy flour content of 0.48-15.48 wt %.

Sessoms et al. '070 disclose that "it is preferred that the weight ratio of basestock component to soy protein be from 0.7:1 to about 2.5:1 (col. 4, lines 50-52). Furthermore, Sessoms et al. '070 disclose, "If amounts of oil in excess of the ratio expressed herein are employed, it may happen that the protein will gum and become dough-ball like" (col. 4, lines 55-58).

As amended, the present invention now has a minimum ratio of fat and/or oil content to soy flour content of 4.167:1 ( $64.50 / 15.48 = 4.167$ ). As such, Sessoms et al. '070 actually teach away from the present invention. As stated in MPEP 2141.02(VI), a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. Thus, Sessoms et al. '070 do not disclose the present invention.

Moreover, the Examiner asserts that Sessoms et al. '070 disclose soy protein in the range of 20-35% (col. 3, lines 5-8). As the Examiner admits, Sessoms et al. '070 fail to disclose the content range of the soy flour of the present invention. As such, the Examiner relies on Rudan et al. '754 to disclose the claimed range of the soy flour. However, the range in Rudan et al. '754 is for peanut flour rather than soy flour. One of ordinary skill in the art would not consider peanut flour and soy flour to be interchangeable. Accordingly, one of ordinary skill in the art would not combine Sessoms et al. '070 with Rudan et al. '754.

In the Advisory Action, the Examiner acknowledged the above argument that one of ordinary skill in the art would not turn to Rudan et al. '754, disclosing peanut flour, when Sessoms et al. '070 disclose soy flour because of the disadvantages associated with peanut flour. In the response, the Examiner asserted that the references were not combined in a manner that one material is substituted for another. Applicants do not argue that one material is substituted for another. Rather, as stated above, one of ordinary skill in the art would not turn to a reference disclosing peanut flour when considering a reference disclosing soy flour.

In addition, the specific percentage of protein, fats, carbohydrates, and antioxidants in the food product of the present invention is unique. One of ordinary skill in the art would have no reason, rationale, or motivation to arrive at the specific percentages of the present invention. Applicants contend that the Examiner has indulged in impermissible hindsight in making the obviousness rejections. That is, the outstanding Office Action merely reflects the piecemeal combination of various elements of various patents, which directly contradicts the rationale of MPEP 2143.01 that the "fact that the claimed invention is within the capabilities of one of ordinary skill in the art is not sufficient by itself to establish *prima facie* obviousness."

To establish a *prima facie* case of obviousness of a claimed invention, all of the claim limitations must be disclosed by the cited references. As discussed above, Sessoms et al. '070 with the other cited references fail to disclose all of the claim limitations of independent claims

1, 15-16, and 43, and those claims dependent thereon. Accordingly, the combinations of references do not render the present invention obvious.

Furthermore, the cited references or the knowledge in the art provide no reason or rationale that would allow one of ordinary skill in the art to arrive at the present invention as claimed. Therefore, a *prima facie* case of obviousness has not been established, and withdrawal of the outstanding rejections is respectfully requested. Any contentions of the USPTO to the contrary must be reconsidered at present.

### Conclusion

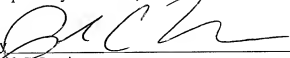
All of the stated grounds of rejection have been properly traversed, accommodated, or rendered moot. Applicants therefore respectfully request that the Examiner reconsider all presently outstanding rejections and that they be withdrawn. It is believed that a full and complete response has been made to the outstanding Office Action, and as such, the present application is in condition for allowance.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Chad M. Rink, Registration No. 58,258, at the telephone number of the undersigned below to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Director is hereby authorized in this, concurrent, and future replies to charge any fees required during the pendency of the above-identified application or credit any overpayment to Deposit Account No. 02-2448.

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Respectfully submitted,

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